Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, ET AL.,
Petitioners,

vs.

JANE DOE, ET AL.,
Respondents.

REPLY BRIEF ON PETITION FOR CERTIORARI.

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The response to respondents' objections to this Court's jurisdiction is two-fold.

First, there is no doubt that throughout this case, respondents relied on an alleged federal constitutional guarantee to a voluntary abortion. Nor is there any doubt that the State Supreme Court relied on the existence of such a federally-created right as the basis for its conclusion in this case:

> To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action. *Reitman* v. *Mulkey*, 387 *U.S.* 369 . . . (1967). Cf. *King* v. *So. Jersey Nat. Bank*, 66 *N.J.* 161 (1974). The federal constitutional right to an abortion during the first trimester is now well-settled. *Roe* v. *Wade, supra.* For the state to frustrate that right by its action would be violative of the constitutional guarantee. *Nyberg* v. *City of Virginia*, 495 *F.*2d 1342 (8th Cir.), appeal dismissed, 419 *U.S.* 891 . . . (1974). . . .

The essential role of the "federal constitutional right" in the decision of the court below, with regard to both the imposition of a duty on petitioners and the grant of a right to respondents, is abundantly clear.

If there were any question about the existence of the federal issues in the case, it is settled by a recitation of the entire dissenting opinion of Mr. Justice Sullivan in the New Jersey Supreme Court:

> Defendants are private, non-profit hospitals serving their respective communities on a voluntary basis. They have adopted a policy, based on social and moral considerations, of not permitting their facilities to be used for elective abortions. I do not view that policy as an infringement on the constitutional rights of the female plaintiffs or their physicians under *Roe* v. *Wade*, 410 *U.S.* 113, 35 *L. Ed.* 2d 147 (1973) and *Doe* v. *Bolton*, 410 *U.S.* 179, 35 L. *Ed.* 2d 201 (1973), particularly when elective abortion facilities were available within reasonable distances. Nor do I think that this Court's decision in *Greisman* v. *Newcomb Hospital*, 40 *N.J.* 389 (1963) mandates that such policy be held to be arbitrary and unreasonable and inimical to the public good. In the context of this litigation I would not require a sectarian or a private non-profit hospital to act contrary to its conscience. None of the cases cited in the majority so holds. I would affirm.

Nor can it be ignored that the New Jersey judicial decision on which the court below purported to rest its judgment, *Greisman* v. *Newcomb Hospital*, 40 N. J. 389 (1963), did justify the regulation of private hospitals on federal constitutional grounds; there, as here, the federal constitutional questions were resolved against petitioner's position:

> Indeed, in the development of the law, activities much less public than the hospital activities of Newcomb, have commonly been subjected to judicial (as well as legislative) supervision and control to the extent necessary to satisfy the felt needs of the time. See, Douglas, J., concurring in *Lombard* v. *Louisiana*, 373 *U.S.* 267 . . . (1963). See also *Munn* v. *Illinois*, 94 *U.S.* 113 . . . (1877); *German Alliance Ins. Co.* v. *Lewis*, 233 *U.S.* 389 . . . (1914); *Nebbia* v. *New York*, 291 U. S. 502 . . . (1934). . . . [40 N.J. at 396-97.]

All through this litigation, the issue of the constitutional rights of plaintiffs to secure voluntary abortions from defendants, and defendants' constitutional rights to be free from such compulsion, have been of the essence of the controversy. The decision of the Supreme Court of New Jersey determined the constitutional questions but sought to avoid responsibility for invasion of defendants' constitutional rights by making only oblique references to the questions at issue. This course of conduct cannot be tolerated if this Court is to have ultimate responsibility for the interpretation of the national Constitution.

CONCLUSION.

The court below has decided that plaintiffs have a federal constitutional right to voluntary abortion which is assertable against the petitioners. That is an erroneous holding about an important federal constitutional question and it should be reversed by this Court.

Respectfully submitted,

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